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No. 87-928

In The
# Supreme Court of the United States
October Term, 1987

METZ BAKING COMPANY and BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433,

*Petitioners,*

vs.

SELMAN (JOE) THOMAS, JR., *et al.*,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 12

I. THE DECISION OF THE EIGHTH CIRCUIT IS IN ACCORD WITH PRIOR SUPREME COURT PRECEDENT AND THE STATED FEDERAL LABOR RELATIONS POLICIES THAT AN ARBITRATION AWARD IS SUBJECT TO REVIEW ONLY UPON A FINDING THAT A UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION. ..... 12

II. THE DECISION OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS REGARDING WHAT CONSTITUTES A VIOLATION OF THE DUTY OF FAIR REPRESENTATION AND WHAT IS REQUIRED BEFORE A PRIOR ARBITRAL AWARD IS VACATED. ..... 15

CONCLUSION ..... 17

APPENDIX A ..... App. 1

APPENDIX B ..... App. 8

# TABLE OF AUTHORITIES

Page

CASES

*Acri v. International Association of Machinists*, 781 F.2d 1393 (9th Cir.) cert. den. 107 S.Ct. 73 (1986) ..... 17

*Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480 (9th Cir. 1985) ..... 16

*Deboles v. Trans World Airlines, Inc.*, 662 F.2d 1005 (3d Cir.) cert. den. 434 U.S. 837 (1977) ..... 16

*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) ..... 12, 14

*Morris v. Werner-Continental, Inc.*, 466 F.2d 185 (6th Cir.) cert. den. 411 U.S. 965 (1972) ..... 16

*Vaca v. Sipes*, 386 U.S. 171 (1967) ..... 12, 14

*Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6th Cir. 1986) cert. den. 107 S.Ct. 3232 (1987) ..... 16

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SELMAN (JOE) THOMAS, JR., *et al.*,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

In 1983 Interstate Brands Corporation ("IBC") and Metz Baking Company ("Metz") both operated baking facilities in Omaha, Nebraska, at separate locations. In January, 1983, the companies reached an agreement relative to the sale of IBC's bakery facility to Metz. The sale

was consummated on February 19, 1983, with Metz taking possession of the plant, equipment and routes on February 21, 1983. Metz operated the former IBC bakery facility without change until early March, 1983. At that time, Metz consolidated all production at the former IBC plant and transferred the employees from its plant to the IBC plant. Metz treated all former IBC employees as new hires as of the date of the sale, February 19, 1983, and layed off all former IBC employees based upon all those employees being placed at the bottom of the seniority list of joint Metz and former IBC employees.

Local 433 of the Bakery, Confectionery and Tobacco Workers Union ("Union") represented the employees at both facilities. Shortly after the lay-offs, a grievance was filed by the former IBC employees, through the Union, alleging that the seniority provisions of the collective bargaining agreement were unfairly and improperly implemented by Metz. The matter proceeded to arbitration before Mr. James A. Doyle[1] on April 26, 1983. The Union took a neutral position. The Arbitrator denied the grievance, which had the result of upholding the action of Metz in laying-off the Respondents.

The collective bargaining agreement in existence for employees at the IBC bakery facility was an industry-wide agreement which applied to separate bargaining units at each plant and each such contract contained identical language. The collective bargaining agreement for the Metz bakery facility and the former IBC bakery facility had

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[1] Dean Emeritus, Creighton University School of Law.

identical language with regard to plant-wide seniority prevailing.

The testimony at the trial of this matter, which occurred in July, 1985, was curiously inconsistent with or non-existent with regard to the facts as found by the Arbitrator. (Appendix D of Petitioners' Brief.)[2]

Mr. Lessman, the Vice President and General Counsel of Metz, testified that around February 19th, he talked to Mr. Clausen, President of the Local 433, regarding the impending sale and indicated to Mr. Clausen that the IBC employees would be treated as new hires and Metz would assign February 19, 1983, as Plaintiffs' new seniority date (Trial Transcript 75:269-70;102:5). Mr. Clausen, however, testified that Mr. Lessman had said that Metz was going to assume the collective bargaining agreement (Trial Transcript 123-25;140); that the Union's position was that Metz had to honor the collective bargaining agreement totally and in all respects (Trial Transcript 131-32); and that if Mr. Lessman had said that Metz was not going to honor the seniority of the IBC employees that the Union would have immediately gone to arbitration (Trial Transcript 314-15). Mr. Clausen then testified that Mr. Lessman did or could have said that Metz was not honoring

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[2] The arbitration award, while in evidence at the trial before the District Court was so admitted solely to evidence the decision of the Arbitrator and was not taken as evidence with regard to any facts found therein. The statement of the case propounded by the Petitioners' relies heavily upon the decision and award of the Arbitrator, Mr. Doyle, rather than referring to the evidence at trial which, for the most part, tended to negate most of the findings of fact of the Arbitrator. The Petitioners err when relying upon the Arbitration award as the basis for the facts in this action.

the seniority of the IBC employees (Trial Transcript 130; 311) but then testified that Mr. Lessman did not say any such thing with regard to seniority (Trial Transcript 313).

Subsequent to the IBC plant being transferred to Metz, it operated without change but for the name on the paycheck of the employees until early March (Trial Transcript 127:90;180:94). No employment applications were ever filled out by any of the employees (Trial Transcript 89-90).

Metz assumed the position that they had hired all former IBC employees on February 19, 1983, and had unilaterally given all such employees a seniority date of February 19, 1983 (Trial Transcript 92;291).

Mr. Lessman contended that the arrangement between Metz and IBC was an asset sale (Trial Transcript 89) although Metz did purchase the routes, tradename and business of IBC (Trial Transcript 292-94).

Mr. Lessman testified that it was Metz' position that it was not bound by the collective bargaining agreement that IBC had with Local 433 under the terms of the purchase agreement with IBC for the sale of the plant (Trial Transcript 79-86;92).

Mr. Clausen testified, again, that the Union's position was that Metz was bound by the terms and conditions of the collective bargaining agreement which IBC had with Local 433 covering the Plaintiffs (Trial Transcript 131-32).

Mr. Clausen testified that the Union went into the arbitration hearing, held on April 26, 1983, with the belief and position that Metz was honoring the collective bargaining agreement which the Union had with IBC and that the

grievance was being submitted on that basis (Trial Transcript 141). The Union's attorney, Mr. Harry Smith, testified at trial that at the arbitration hearing and in his brief to the arbitrator, he acknowledged and argued that the former IBC employees did not receive their seniority when Metz took over the IBC operations (Trial Transcript 172).

Mr. Clausen testified that he and Mr. Harry Smith, the Union's attorney, discussed this case quite frequently and that he believed Mr. Smith knew the Union's position (Trial Transcript 316). Mr. Clausen did not know why Mr. Smith would agree with Mr. Lessman regarding seniority (Trial Transcript 316-17). After the sale was consummated between IBC and Metz, but before the lay-offs, neither the Union nor Metz demanded or requested negotiations (Trial Transcript 91;95;126).

The sale agreement between IBC and Metz provided that IBC would assign the collective bargaining agreement to Metz and that Metz ". . . shall became the successor employer under, and shall use its best efforts to obtain novations with respect to . . ." the collective bargaining agreement.[3] Mr. Lessman testified that he obtained a novation with regard to the collective bargaining agreement from Mr. Clausen (Trial Transcript 87).

Mr. Lessman acknowledged that had Metz assumed all obligations of the IBC collective bargaining agreement with the Union, then upon consolidation of the two plants, the Metz employees would have been layed-off rather than

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[3] Section 10. Transferred Employees, Purchase Agreement between IBC and Metz. See Appendix B to Petitioners' Brief, 7a.

the former IBC employees (Trial Transcript 284;294-95; 304-5).

After the lay-offs had been announced by Metz, the Plaintiffs initiated a grievance (Trial Transcript 134). Mr. Smith wrote it (Trial Transcript 135;249) and it was signed by the employees (Trial Transcript 210). It was then presented to Metz by Mr. Clausen (Trial Transcript 135).

The Union, through Mr. Clausen, advised Metz, via Mr. Lessman, that it was taking a neutral position with regard to the grievance (Trial Transcript 135). The Union took this neutral position based upon the advice of its attorney (Trial Transcript 140-41). Mr. Smith gave this advice very early and without the benefit of any investigation (Trial Transcript 153;156-57;128).

The Union held a meeting of the four Omaha bargaining units in order to discuss the grievance with the Metz and former IBC bargaining unit employees (Trial Transcript 182;136). This meeting was held after the grievance had been filed and before the arbitration. Local 433 had 1,100 to 1,200 members with 14 to 15 separate bargaining units at different plants (Trial Transcript 247). This Union meeting was held on March 12, 1983, and two people were selected from the Metz and IBC groups to testify at the arbitration hearing (Trial Transcript 182).

Mr. James Walker and Mr. William Marsh were selected to represent the former IBC employees. They met with Mr. Harry Smith and Mr. Clausen on March 19, 1983. No discussions were had at the conference regarding Metz changing any seniority dates (Trial Transcript 183;199) or whether Metz assumed the collective bargaining agree-

ment of IBC in total (Trial Transcript 184;200). At the meeting, Mr. Walker asked to see the purchase agreement between Metz and IBC (Trial Transcript 184 85;200). Mr. Marsh did mention the successorship clause in the collective bargaining agreement (Trial Transcript 200). Mr. Clausen indicated that he would have the purchase agreement between Metz and IBC at the arbitration hearing (Trial Transcript 185-86). The meeting lasted ten to fifteen minutes (Trial Transcript 203).

No other contact was had between any of the former IBC employees and the Union until the arbitration hearing, although Mr. Walker had attempted to contact the Union but had received no response (Trial Transcript 186).

Mr. Smith told the former IBC employees that they could say whatever they wished at the arbitration hearing (Trial Transcript 191).

Prior to the arbitration hearing, neither Mr. Clausen nor other officers of the Union, nor even Mr. Smith, reviewed the purchase agreement between IBC and Metz (Trial Transcript 127). Mr. Lessman indicated that Mr. Clausen had requested a copy of the purchase agreement but does not remember when (Trial Transcript 96). Mr. Smith knew of the purchase agreement prior to the arbitration did not review it since he did not consider it any of his business (Trial Transcript 149).

Mr. Lessman testified that prior to the arbitration hearing, he never recalled having any conversations with Mr. Smith regarding the former IBC employees' status or the lay-offs (Trial Transcript 99-100;105-6). He indicated that he seldom dealt with Mr. Smith.

Mr. Smith testified that he had dealt with Mr. Lessman before and that Mr. Lessman's word was good (Trial Transcript 164).

Mr. Smith later testified to a telephone conference which he had with Mr. Lessman wherein Mr. Lessman indicated that the sale between IBC and Metz was an asset sale and that in the conversation Mr. Smith had indicated to Mr. Lessman that the only fair thing to do was to go to arbitration and that the two generally discussed theories of the case (Trial Transcript 165-66).

Thereafter, Mr. Lessman testified, after listening to Mr. Smith, that his memory had been refreshed and that he now recalled, not a telephone conference with Mr. Smith, but a meeting with Mr. Smith in Mr. Smith's office where the parties reviewed cases and discussed theory regarding this matter. He did not recall reviewing the purchase agreement between IBC and Metz with Mr. Smith, at least he was pretty sure he did not do this (Trial Transcript 300; 302; 303-4).

Mr. Clausen attended the arbitration hearing (Trial Transcript 126-27). Mr. Smith called Mr. Lessman to testify but did not call Mr. Clausen to testify (Trial Transcript 178-79). Mr. Lessman testified that the agreement between IBC and Metz was an asset sale (Trial Transcript 98) and that Metz did not assume the collective bargaining agreement which IBC had with the Union (Trial Transcript 111).

Mr. Lessman acknowledged that the only evidence at the arbitration hearing regarding the Plaintiffs' seniority was Mr. Lessman's testimony that under the purchase agreement between IBC and Metz that Metz did not as-

sume the collective bargaining agreement and that the seniority date of the Plaintiffs was February 19, 1983 (Trial Transcript 298).

Mr. Lessman acknowledged that the arbitrator's undisputed facts (Appendix D to Petitioners' Brief) were basically his testimony (Trial Transcript 300).

Mr. Smith testified relative to his labor expertise and the forty-six years of practice as an attorney in the labor relations field (Trial Transcript 142-43).

At the time of the arbitration, Mr. Harry Smith considered the purchase agreement between IBC and Metz to be immaterial because Mr. Lessman had told him that the sale was an asset sale (Trial Transcript 144). Mr. Smith acknowledged reading the purchase agreement *after* the arbitration hearing and testified that it was exactly as Mr. Lessman had testified (Trial Transcript 145). Mr. Smith seemed disinclined to answer questions put to him regarding the Union's position taken at the arbitration hearing (Trial Transcript 145-51). Mr. Smith did acknowledge that the Plaintiffs went to work for Metz as new employees (Trial Transcript 150) and that he had accepted Mr. Lessman's testimony regarding this (Trial Transcript 151).

While Mr. Harry Smith did testify that he argued to the arbitrator that Metz had assumed the IBC collective bargaining agreement (Trial Transcript 162) he also testified that Mr. Lessman's testimony was sufficient and that the actual purchase agreement was not important because the sale between IBC and Metz was an asset sale and that the Respondents were given everything but their seniority (Trial Transcript 163).

Mr. Harry Smith was aware that Metz hired all of the former IBC employees and stated that all Metz would have had to have done was to close the plant for one day, discharge all the people and hire them back as new employees, but Metz did not do this (Trial Transcript 154).

Mr. Smith acknowledged that if Metz had hired all former IBC employees and did not honor the collective bargaining agreement, then Metz could *not* have modified the terms and conditions of the IBC collective bargaining agreement by unilateral action (Trial Transcript 154-55).

Mr. Smith testified that while he did call Mr. Lessman at the arbitration hearing, he did not know that Mr. Lessman was going to attend the hearing and the only purposes for which Mr. Lessman was called was to testify for background information and the terms of the purchase agreement (Trial Transcript 155).

The Arbitrator's Award specifically contained a finding that there was no agreement between IBC and Metz regarding the status of the former IBC employees upon the sale to Metz.

Several of the "facts" of this case stated by the Petitioners in their brief, are, in actuality, findings of fact of the Arbitrator and were never established at trial. Several of these facts are as follows:

1. IBC was operating the plant at a "substantial loss, which warranted a conclusion that if not disposed of, closure of the plant was probable, if not inevitable." (Petitioners' Brief, page 2).

2. IBC therefore initiated negotiations with Metz to sell IBC's existing plant and facilities (Petitioners' Brief, page 2).

3. Even if negotiations had been requested, Metz did not intend to sacrifice the interests of its work force over that of the former IBC employees. (Petitioners' Brief, page 3).

4. Metz, in accordance with past practice, was determined to treat the IBC workers as "new hires" and to "end-tail" them at the bottom of the seniority list, thus protecting the existing Metz work force (Petitioners' Brief, page 3).

5. The sale agreement between IBC and Metz did not contain any provision for IBC workers to obtain seniority over Metz workers after the purchase (Petitioners' Brief, page 3).

6. The collective bargaining agreement did not contain any provision for integration of employees in the event the two work forces were combined (Petitioners' Brief, page 3).

7. None of the IBC employees requested that the sale agreement between IBC and Metz be produced or made a part of the record at the arbitration hearing (Petitioners' Brief, page 5).

8. The collective bargaining agreement did not answer the question of whether workers should be "end-tailed" or "dove-tailed" once integration of the work forces occurred (Petitioners' Brief, page 5).

9. Metz was following its past practice and the practice of the industry in treating the IBC employees as "new hires" (Petitioners' Brief, page 5).

10. The Union's attorney specifically argued to the Arbitrator on behalf of the IBC workers that Metz had

assumed the collective bargaining agreement which the Union had with IBC (Petitioners' Brief, page 6).

Trial in the United States Federal District Court for the District of Nebraska was bifurcated and the issue of liability of the Defendants was first tried to the jury. The jury found in favor of the Plaintiffs and returned a special verdict (Appendix B). Approximately one year later, the Court sustained the motions of both Petitioners herein for judgment notwithstanding the verdict and set aside the jury verdict. Thereafter, this action was appealed to the Eighth Circuit by Respondents herein which reversed the Federal District Court's granting of judgment notwithstanding the verdict for both Petitioners and remanded the case for further proceedings.

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## ARGUMENT

### I.

### THE DECISION OF THE EIGHTH CIRCUIT IS IN ACCORD WITH PRIOR SUPREME COURT PRECEDENT AND THE STATED FEDERAL LABOR RELATIONS POLICIES THAT AN ARBITRATION AWARD IS SUBJECT TO REVIEW ONLY UPON A FINDING THAT A UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION.

The Eighth Circuit's Decision strictly adhered to the principals enunciated in *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and in its opinion stated that Metz was entitled to rely upon the arbitrator's award as a bar to subsequent

litigation of the claim unless the Respondents herein proved that the Union violated its duty of fair representation and that this breach tainted or seriously undermined the integrity of the arbitral process (Petitioners' Brief App. 8A-9A).

The Petitioner Union was found to have violated its duty of fair representation on two separate and distinct bases: the first, in failing to negotiate with Metz at the time of the sale (February 19, 1983); second, in the manner in which it processed the grievance of the Respondents up to and including the arbitration.

The only breach which relates to avoiding the bar of the arbitration award is the breach regarding the handling of the grievance of the Respondents. The Union's breach of its duty of fair representation by failing to negotiate with Metz was not and is not now a basis for challenging the arbitrator's award. The Petitioners consistently characterize the Union's breach with regard to failing to negotiate as insufficient to constitute a violation of the duty of fair representation which would amount to a tainting or undermining of the integrity of the arbitral process. The Petitioners are correct in this conclusion. However, the manner in which the Union handled the grievances of the Respondents up to and including the arbitration certainly evidenced bad faith and dishonesty on the part of the Union and constituted a violation of its duty of fair representation. Once this was established, the only remaining issue was whether or not the Union's breach of its duty of fair representation was such that it tainted or undermined the integrity of the arbitral process. The special verdict (App. B) of the jury in this regard was

clear. The instructions of the Court to the jury regarding this issue (App. A) were specifically in accord with *Vaca v. Sipes,* supra and *Hines v. Anchor Motor Freight, Inc.,* supra.

The manner in which the Union processed the grievance of the Respondents was such that the jury found, as did the Eighth Circuit, that the Union breached its duty of fair representation to the Respondents and that this breach seriously undermined and tainted the arbitration proceeding. The Petitioners, while attempting to argue a legal issue to this Court are, in effect, simply seeking to overturn the findings of fact of the jury. The Petitioners cite as "facts" to this Court the findings of the arbitrator rather than the evidence produced at trial. The Petitioners seem to ignore the fact that the Union President lied to one of the Respondents regarding the security of his job and with regard to having the sale agreement between IBC and Metz at the arbitration hearing; that the Union President and the Union attorney had diametrically opposing positions with regard to the seniority claims of the Respondents; that the Vice President and General Counsel of Metz and the Union attorney testified at trial in an inconsistent manner regarding their conversations and meetings regarding this matter; that the Union took a "neutral position" with regard to the grievance but presented evidence, primarily the testimony of Mr. Lessman, that assured that the Resopndents would fail at the arbitration hearing; that the Union President was never called at the arbitration hearing; and that, finally, the sale agreement between IBC and Metz, which in large measure dictated that seniority rights of the Respondents, was not produced at the arbitration hearing.

These relevant facts at the trial of this action supported the findings made by the trier of fact. In reviewing these findings, when one compares the arbitrator's decision to the evidence at trial, inclusive of the sale agreement between IBC and Metz, it can hardly be said that there was a lack of evidence on the part of the Respondents to prove that the Union breached its duty of fair representation and that this breach tainted and undermined the arbitration hearing.

The decision of the Eighth Circuit was in accord with the prior decisions of this Court and the federal policy of labor relations regarding arbitral decisions. On infrequent occasions, such as this, the arbitrator's decision is subject to review if that decision is the product of the Union's breach of its duty of fair representation which results in essential facts being withheld from the arbitrator and, thereby, taints and undermines the integrity of the arbitration process.

## II.

## THE DECISION OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS REGARDING WHAT CONSTITUTES A VIOLATION OF THE DUTY OF FAIR REPRESENTATION AND WHAT IS REQUIRED BEFORE A PRIOR ARBITRAL AWARD IS VACATED.

Once again the Petitioners argue to this Court that the Union's breach of its duty of fair representation with regard to failing to negotiate with Metz cannot rise to a level where it can be found to taint or undermine the arbitral process. The Petitioners are, once again, correct. The Eighth Circuit in its decision did not so find. There

is no conflict between the Eighth Circuit and any other Circuit with regard to this issue.

The Petitioners have cited to this Court *Wood v. International Brotherhood of Teamsters,* 807 F.2d 493 (6th Cir. 1986) cert. den. 107 S.Ct. 3232 (1987) which dealt with the issue of whether or not a Union breached its duty of fair representation by failing to negotiate with the former employer, the new employer having been dismissed from the law suit. There is no conflict between *Wood* and in this action since, in this case, the Union's breach of its duty of fair representation which was found to have tainted and undermined the arbitral process related to the Union's handling of the grievance of the Respondents and not the Union's failure to negotiate with Metz when it purchased the business of IBC.

The Petitioners cite *Morris v. Werner-Continental, Inc.,* 466 F.2d 185 (6th Cir.) cert. den. 411 U.S. 965 (1972) as supportive of their position. Unfortunately, in *Morris,* supra, there simply was no finding that the Union breached its duty of fair representation and hence this case is not supportive of Petitioners' position. *Morris,* supra, is simply not on point.

In citing *Deboles v. Trans World Airlines, Inc.,* 662 F.2d 1005 (3d Cir.) cert. den. 434 U.S. 837 (1977), the Petitioners once again raise the issue of failing to negotiate as the basis upon which the Eighth Circuit found that the arbitral process was tainted and undermined. This was not the basis for the Eighth Circuit's decision in this action and, therefore, *Deboles,* supra, is not applicable.

In citing the Ninth Circuit decision of *Castelli v. Douglas Aircraft Co.,* 752 F.2d 1480 (9th Cir. 1985) the Peti-

tioners are merely arguing a question of fact, once again, relative to whether or not the Union's actions in this case amounted to mere negligence or, conversely, constituted a breach of the Union's duty. Considering the evidence at trial, the instructions to the jury and the jury's findings in this regard, this issue is moot.

In *Acri v. International Association of Machinists,* 781 F.2d 1393 (9th Cir.) cert. den. 107 S.Ct. 73 (1986) the Petitioners are once again arguing a "failure-to-bargain" case. Since the Union's failure to negotiate with Metz, which was found to be a breach of its duty of fair representation, was not the basis upon which the arbitration award was found to have been tainted or undermined, this argument is simply not applicable.

The conflicts which the Petitioners suggest exist between the Eighth Circuit and that of the Third, Fourth, Sixth, Seventh and Ninth Circuits are, in actuality, nonexistent and serve as no basis for the issuance of the writ prayed for herein.

## CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should be denied herein.

Respectfully submitted,

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | |
|---|---|
| SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, vs. BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433, et al., Defendants. | CV 83-0-652<br>COURT'S CHARGE TO THE JURY<br>(Filed July 16, 1985) |

• • •

Jury instructions numbers 1 through 7 and 12 through 25 intentionally omitted by counsel for the Respondents.

### INSTRUCTION NO. 8

Defendant Union acted as the exclusive collective bargaining representative for the production employees of Interstate Brands Corporation at its plant in Omaha, Nebraska, including plaintiffs in this case, and the production employees of defendant Metz at its plants in Omaha, Nebraska. As the collective bargaining representative of both groups of employees, defendant Union was obligated by law to represent both groups of employees fairly in its dealing with their employers in regard to their rights under their collective bargaining agreements. This obligation is known as defendant Union's duty of fair representation.

A wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The duty of a union is to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary or perfunctory conduct. A breach of this duty occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, perfunctory, discriminatory, or in bad faith.

"Perfunctory" means without concern or solicitude, indifferent.

INSTRUCTION NO. 9

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporation's Omaha facility, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporation's Omaha facility:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

Honest, but mistaken, conduct may not be considered arbitrary, discriminatory or bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern may support a finding that the Union acted in an arbitrary or perfunctory manner.

INSTRUCTION NO. 9 PAGE 2

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that had the Union negotiated the defendant Metz would not have laid off the plaintiffs in March, 1983.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union breached its duty of fair representation to the plaintiffs by failing to negotiate and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the defendant Union and against the plaintiffs' claim that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union

breached its duty of fair representation to the plaintiffs by failing to negotiate and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the plaintiffs and against the defendant Union on plaintiffs claim that the Union breached its duty of fair representation by failing to negotiate.

INSTRUCTION NO. 10

In addition, the plaintiffs allege the defendant Union committed a breach of its duty of fair representation toward the plaintiffs by the position taken between the seniority claims of plaintiffs and those of defendant Metz' employees in processing plaintiffs' grievance and/or by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance.

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs under either or both of these theories, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that in the investigating and processing of the plaintiffs' seniority claims and grievances:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

As you were instructed before, honest, but mistaken, conduct may not be considered arbitrary, discriminatory or

bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern or

INSTRUCTION NO. 10 PAGE 2

solicitude or gave plaintiffs' claims and grievance only cursory attention may support a finding that the Union acted in an arbitrary or perfunctory manner.

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs in the investigation and processing of the plaintiffs' seniority claims and grievances, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union breached its duty of fair representation to the plaintiffs in the investigating and processing of the plaintiffs' seniority claims and grievances and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of defendant Union and against the plaintiffs on plaintiffs' claim that the Union

breached its duty of fair representation to the plaintiffs by the position taken and/or by not presenting a copy of the sales contract.

INSTRUCTION NO. 10 PAGE 3

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union breached its duty of fair representation to the plaintiffs and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you will proceed in your deliberations to consider the plaintiffs' claim against defendant Metz for breach of the Collective Bargaining Agreement.

In this regard you are instructed that a decision by an arbitrator in a labor arbitration proceeding is final and binding unless the Union breached its duty of fair representation to the prejudice of the plaintiffs as earlier explained in this instruction.

INSTRUCTION NO. 11

You are instructed that the failure of defendant Union to negotiate with defendant Metz in regard to plaintiffs' job seniority upon defendant Metz' purchase of the Interstate Brands Corporation's Omaha facility, or, the position taken by defendant Union as to the seniority claims of plaintiffs and those of defendant Metz' employees in the processing of plaintiffs' grievance do not alone comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that those actions of defendant Union were done with hostility toward plaintiffs, discriminated against them, were

done in bad faith or were arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs' interests.

You are further instructed that defendant Union's failure to present a copy of a sales agreement between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance does not by itself comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that such action of defendant Union was done with hostility toward plaintiffs, discriminated against them, was done in bad faith or was arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs interests.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---|---|---|
| SELMAN (JOE) THOMAS, JR., et al, | ) | CV 83-0-652 |
| Plaintiffs, | ) | SPECIAL VERDICT |
| vs. | ) | |
| BAKER, CONFECTIONERY AND TOBACCO WORKERS UNION, LOCAL #433, et al., | ) | (Filed July 16, 1985) |
| Defendants. | ) | |

QUESTION NO. 1: Do you find from a preponderance of the evidence that defendant Union breached its duty of fair representation with respect to the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz' purchase of the Interstate Brands Coropration's Omaha facility?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 2. IF YOUR ANSWER IS "NO", GO TO QUESTION 3.

QUESTION NO. 2: Do you find from a preponderance of the evidence that had the Union negotiated in regard to their job security upon defendant Metz' purchase of Interstate Brands Corporation's Omaha facility the defendant Metz would not have laid off the plaintiffs in March, 1983?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 3.

QUESTION NO. 3: Do you find from a preponderance of the evidence that the Union breached its duty of fair representation with respect to the plaintiffs by the position taken by the Union with regard to the seniority claims of the plaintiffs and those of defendant Metz' previous employees in processing plaintiffs' grievance *and/or* by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 4. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 4: Do you find from a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 5. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 5: Do you find from a preponderance of the evidence that defendant Metz expressly agreed to be bound to the seniority provisions of the Collective Bargaining Agreement in the sales agreement executed between defendant Metz and Interstate Brands Corporation?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 6.

QUESTION NO. 6: Do you find from a preponderance of the evidence that defendant Metz impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its actions?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES" TO EITHER OR BOTH OF QUESTIONS 5 OR 6, GO TO QUESTION 7. IF YOUR ANSWER IS "NO" TO *BOTH* QUESTIONS 5 *AND* 6, YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 7: Do you find from a preponderance of the evidence that defendant Metz breached the seniority provisions of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 8. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 8: Do you find from a preponderance of the evidence that the plaintiffs were laid off as a result of the breach of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

YOUR FOREPERSON IS TO NOW DATE AND SIGN THIS SPECIAI VERDICT.

DATED this 16th day of July, 1985.

/s/ Ellen L. Zurcher
FOREPERSON